Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08()-144 OF 2011(W)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA AND AHMAD MAAROP FCJ
16 DECEMBER 2011

Civil Procedure — Contempt of court — Committal proceedings — Breach of ex parte preservation order — Respondents applied to set aside leave for committal proceedings — Whether procedure adopted under O 52 r 2(2) of the Rules of the High Court 1980 irregular — Whether statement and verifying affidavit in support of application for leave to commence committal proceedings ought to be filed prior to date of filing of motion for leave — Whether irregularities fatal to applicants' motion for leave — Whether breach of ex parte preservation order proven — Whether first respondent lied in affidavit opposing motion — Whether second, third, fourth and fifth respondents caused, aided or abetted first respondent to commit contempt of court — Rules of the High Court 1980 O 52 r 2

The first respondent had obtained judgment in the sum of RM23,412,034.65 against the applicants in the High Court ('the High Court judgment'). The second respondent, a consultant in Messrs Kumar Jaspal Quah and Aishah ('the firm'), had represented the first respondent in all proceedings related to this suit, while the third, fourth and fifth respondents were all partners of the firm. Dissatisfied with the High Court judgment, the applicants had appealed to the Court of Appeal, and also applied for a stay of execution of the High Court judgment pending the disposal of the appeal ('the High Court stay application'). Before the High Court stay application was heard the parties had recorded a consent order, whereby they consented to an interim stay of execution of the High Court judgment conditional upon the judgment sum and interests being paid to Messrs Zul Rafique and Partners as stakeholders ('the stakeholder'). Accordingly the sum of RM34,989,978.47 was deposited by the stakeholder in a fixed deposit account ('the FD sum') to be released in the event the stay application was dismissed. When the High Court dismissed the stay application the applicants immediately appealed to the Court of Appeal, and at the same time filed in the Court of Appeal an ex parte application for a stay of execution of the High Court judgment. The Court of Appeal granted the ex parte stay application. However, on the 28 February 2011 after hearing the inter parte application the court dismissed the stay application. On the afternoon of the same day, the stakeholder released the FD sum plus accrued interests of RM35,087,135.06 to the firm vide a cheque. In the meantime the applicants had filed an ex-parte application in this court for an order to preserve

the released sum in the hands of the firm. On 2 March 2011, this court granted an ex parte preservation order over the released sum ('the preservation order') but directed that the application for the preservation order be heard inter parte. The applicants served the preservation order on the second respondent and the firm, vide an email on 2 March 2011, and again on the firm, vide a facsimile on 3 March 2011. The first respondent opposed the inter parte application for the preservation order and filed an affidavit prepared by the second respondent wherein he deposed that the released sum was no longer in the firm's possession but had been disbursed to him vide two cash cheques before the preservation order was served on the respondents. Subsequently this court dismissed the applicants' application for the inter parte preservation order on the grounds that the subject matter of the order was no longer in the hands of the respondents. However, the applicants then filed and obtained the leave of this court to commence committal proceedings against all the respondents pursuant to O 52 of the Rules of the High Court 1980 ('RHC'). The applicants alleged that the released sum had been in the possession of the firm when the preservation order was served on the firm and not disbursed to the first respondent as the latter had claimed in his affidavit. It was the applicants' case that the first respondent had committed contempt of court by making the false statement in his affidavit and the second to fifth respondents for having caused, aided or abetted the first respondent to commit the contempt of court. The respondents in turn had applied for and obtained leave, on an ex-parte basis, to set aside the leave for committal proceedings. The respondents also raised the procedural objection that the applicants were in breach of O 52 r 2 (2) of the RHC. The respondents argued that the statement and verifying affidavit in support of the application for leave ought to have been filed prior to the date of the filing of the motion for leave but that they were filed after the date of the filing of the notice of motion for the leave.

Held, striking out the motion for committal against the respondents with costs:

(1) This court found that O 52 r 2 (2) of the RHC required an affidavit verifying the facts to be filed before the application was made, and that the word 'application' meant the hearing of the application by the court and not the filing of the application. Further, the irregularities complained of in the present case were mere technical irregularities, which did not cause any prejudice or injustice to the respondents. As such, the procedural objection raised by the respondents was dismissed (see paras 42–44).

(2) Based on the affidavits filed on behalf of the respondents it was clear that the monies were disbursed to the first respondent in three tranches. From the evidence it was also clear that the entire released sums were paid out and cleared from the firm's account by 2 March 2011, that is one day prior to the service of the notice of the ex-parte preservation order on the

respondents. Therefore, the question of breach of the ex parte preservation order did not arise. Similarly the averments in the first respondent's affidavit regarding the released sum could not be a lie as alleged by the applicants and the statement filed pursuant to O 52 r 2 (2) of the RHC was unsustainable (see paras 47 & 55).

(3) Since the complaint against the first respondent was unsustainable, the complaints against the second, third, fourth and fifth respondents were equally unsustainable (see para 56).

[Bahasa Malaysia summary

Responden pertama telah memperoleh penghakiman untuk jumlah RM23,412,034.65 terhadap pemohon-pemohon di Mahkamah Tinggi ('penghakiman Mahkamah Tinggi'). Responden kedua, perunding di Tetuan Kumar Jaspal Quah & Aishah ('firma'), telah mewakili responden pertama dalam semua prosiding berkaitan guaman ini, manakala responden-responden tiga, keempat dan kelima semua merupakan rakan kongsi firma tersebut. Berasa tidak puas hati dengan penghakiman Mahkamah Tinggi, pemohon-pemohon telah merayu ke Mahkamah Rayuan, dan juga memohon untuk penggantungan pelaksanaan penghakiman Mahkamah Tinggi sementara menunggu rayuan selesai (permohonan penggantungan Mahkamah Tinggi'). Sebelum permohonan penggantungan Mahkamah Tinggi didengar pihak-pihak telah merekodkan perintah persetujuan, di mana mereka bersetuju terhadap penggantungan interim berhubung pelaksanaan penghakiman Mahkamah Tinggi dengan syarat berdasarkan jumlah penghakiman dan faedah yang dibayar kepada Tetuan Zul Rafique & Partners sebagai pemegang amanah ('pemegang amanah'). Sewajarnya jumlah RM34,989,978.47 telah didepositkan oleh pemegang amanah dalam akaun deposit tetap ('jumlah FD') untuk pembayaran sekiranya permohonan penggantungan ditolak. Apabila Mahkamah Tinggi menolak permohonan penggantungan pemohon-pemohon segera merayu ke Mahkamah Rayuan, dan pada masa sama memfailkan di Mahkamah Rayuan permohonan ex parte untuk penggantungan pelaksanaan penghakiman Mahkamah Tinggi. Mahkamah Rayuan membenarkan permohonan penggantungan ex parte tersebut. Walau bagaimanapun, pada 28 Februari 2011 setelah mendengar permohonan ex parte tersebut mahkamah menolak permohonan penggantungan itu. Pada tengahari itu, pemegang amanah telah membayar jumlah FD juga faedah terakru RM35,087,135.06 kepada firma tersebut melalui cek. Sementara itu pemohon-pemohon telah memfailkan pemohonan ex parte di mahkamah ini untuk perintah bagi mengekalkan jumlah dibayar dengan firma tersebut. Pada 2 Mac 2011, mahkamah ini memberikan perintah pengekalan ke ata jumlah yang dibayar ('perintah pengekalan') tetapi mengarahkan bahawa permohonan untuk perintah pengekalan didengar inter parte. Pemohon-pemohon telah menyerahkan perintah pengekalan ke atas responden kedua dan firma tersebut, melalui emel bertarikh 2 Mac 2011, dan

sekali lagi ke atas firma tersebut, melalui faksimili pada 3 Mac 2011. Responden pertama membantah permohonan inter parte untuk perintah pengekalan itu dan telah memfailkan afidavit yang disediakan oleh responden kedua di mana dia mendeposkan bahawa jumlah yang dibayar bukan lagi dalam milikan firma tersebut tetapi telah dibayar kepadanya melalui dua cek tunai sebelum perintah pengekalan itu diserahkan ke atas responden-responden. Berikutan itu mahkamah telah menolak permohonan pemohon-pemohon untuk perintah pengekalan inter parte atas alasan-alasan bahawa perkara pokok perintah bukan lagi dalam tangan responden-responden. Walau bagaimanapun, pemohon-pemohon telah memfailkan dan memperoleh kebenaran mahkamah ini untuk memulakan prosiding komital terhadap semua responden menurut A 52 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Pemohon-pemohon mendakwa bahawa jumlah yang dibayar berada dalam milikan firma tersebut apabila perintah pengekalan diserahkan ke atas firma tersebut dan tidak dibayar kepada responden pertama sebagaiman yng didakwa oleh responden pertama dalam afidavitnya. Ia adalah kes pemohon-pemohon bahawa responden pertama telah melakukan penghinaan mahkamah dengan membuat kenyataan palsu dalam afidavitnya dan responden-responden kedua hingga kelima kerana menyebabkan, membantu atau bersubahat dengan responden pertama untuk melakukan penghinaan mahkamah. Responden-responden sebaliknya telah memohon untuk dan memperoleh kebenaran, secara ex parte, untuk mengetepikan kebenaran untuk prosiding komital. Responden-responden juga menimbulkan bantahan prosedur bahawa pemohon-pemohon telah melanggar A 52 k 2(2) KMT. Responden-responden berhujah bahawa kenyataan itu dan afidavit pengesahan bagi menyokong permohonan kebenaran patut difailkan sebelum tarikh pemfailan usul kebenaran tetapi ia telah difailkan selepas tarikh pemfailan notis usul untuk kebenaran tersebut.

Diputuskan, membatalkan usul untuk komital terhadap responden-responden dengan kos:

(1) Mahkamah ini mendapati bahawa A 52 k 2 KMT menghendaki afidavit mengesahkan fakta yang perlu difailkan sebelum permohonan dibuat, dan bahawa perkataan 'application' bermaksud perbicaraan permohonan oleh mahkamah dan bukan pemfailan permohonan. Selanjutnya, luar aturan yang diadukan dalam kes ini hanya luar aturan teknikal, yang tidak menyebabkan apa-apa prejudis atau ketidakadilan kepada responden-responden. Oleh itu, bantahan prosedur yang ditimbulkan oleh repsonden-responden ditolak (lihat perenggan 42–44).

(2) Berdasarkan afidavit bagi pihak responden-responden adalah jelas bahawa wang telah dibayar kepada responden pertama dalam tiga peringkat. Berdasarkan keterangan juga jelas bahawa keseluruhan jumlah yang dibayar telah dibayar dan dikeluarkan dari akaun firma sehingga 2 Mac 2011, iaitu satu hari sebelum penyampaian notis berhubung

perintah pengekalan ex parte ke atas responden-responden. Oleh itu, persoalan pelanggaran perintah pengekalan ex parte tidak timbul. Begitu juga dengan penegasan dalam afidavit responden pertama berkaitan jumlah yang dibayar tidak mungkin satu penipuan sepertimana didakwa oleh pemohon-pemohon dan kenyataan yang difailkan menurut A 52 k 2(2) KMT tidak boleh dikekalkan (lihat perenggan 47, 55).

(3) Oleh kerana aduan terhadap responden pertama tidak boleh dikekalkan, aduan-aduan terhadap responden kedua, ketiga, keempat dan kelima juga tidak boleh dikekalkan (lihat perenggan 56).]

Notes

For cases on commital procedings, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1931–1962.

Cases referred to

AG v Newspaper Publishing Plc [1987] 3 All ER 276, Ch D (refd)
AG v Times Newspapers Ltd [1973] 3 All ER 54, HL (refd)
Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193, SC (refd)
B (JA) (An Infant), Re [1965] 1 Ch 1112 (refd)
Becker v Neol and Another [1971] 1 WLR 803, CA (refd)
Bramblevale Ltd, Re [1970] 1 Ch 125 (refd)
Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240, HC (refd)
Chanel Ltd v FGM Cosmetics [1981] FSR 471 (refd)
Chiltern District Council v Keane [1985] 2 All ER 118, CA (refd)
Chung Onn v Wee Tian Peng [1996] 5 MLJ 521, HC (refd)
Follin & Brothers Sdn Bhd v Wong Boon Sun & Ors and Another Appeal [2009] 5 MLJ 362; [2010] 4 CLJ 64, CA (refd)
HE Kingdon, Re v SC Goho [1948] 1 MLJ 17 (refd)
Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd [2001] 4 MLJ 577, CA (folld)
Jennison Ors v Baker [1972] 1 All ER 997, CA (refd)
Master Jacob (1970) Current Legal Problems 23 (refd)
McIlraith v Grady [1968] 1 QB 468, CA (refd)
Soceite Jas Hennessy & Co & Anor v Nguang Chan (M) Sdn Bhd [2005] 4 MLJ 348, HC (refd)
Syarikat M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 13
Criminal Procedure Code
Federal Constitution art 126
Penal Code
Rules of the Federal Court 1995 r 3
Rules of the High Court 1980 O 52, O 52 rr 1(2)(a)(ii), 2, 2(2)

A Rules of Supreme Court 1965 [UK] O 52

K Kirubakaram (BE Teh and Fadzilah Pilus with him) (Teh & Associates) for the applicants.
David Mathews (Regina Ho with him) (Mathews Hun Lachimanan) for the first
B *respondent.*
Sulaiman bin Abdullah (Kumar Jaspal Quah & Aishah) for the second respondent.
Krishna Dallumah (Krishna Dallumah, Maniam & Indran) for the third respondent.
C Sri Kumar (Kumar Partnership) for the fourth respondent.
C *Jagjit Singh Gill (Putra Gill) for the fifth respondent.*

Arifin Zakaria CJ (delivering judgment of the court):

INTRODUCTION

D

[1] On 19 May 2011, this court gave leave to the applicants to commence committal proceedings against the respondents. The leave was granted pursuant to O 52 r 2 (2) of the Rules of the High Court 1980 ('the RHC') read
E together with r 3 of the Rules of the Federal Court ('the RFC'). The committal proceeding was set down for hearing before us on 14 December 2011. However, the respondents' had in the mean time applied for the leave order to be set aside. Since leave was granted by us on an ex parte basis, it is within the inherent power of this court to revoke the same if it is of the view that the
F original leave was granted under a misapprehension upon new matters being placed before it (see Lord Denning MR in *Becker v Neol and Another* [1971] 1 WLR 803).

Having heard the parties, we allowed the respondents' applications and set
G aside our earlier order. We now give our reasons for the decision.

THE FACTS

[2] The facts leading to the present applications are briefly as follows: Action
H was commenced by the first respondent against the applicants in the High Court for breach of the alleged oral contract between the first applicant and the first respondent, in which the first applicant is said to have agreed to pay a commission to the first respondent for procuring a government project for the third applicant. After a full trial, the High Court allowed the first respondent's
I claim with costs and awarded damages in the sum of RM23,412,034.65 ('the judgment sum') plus interests.

[3] During the trial, the first respondent was represented by Messrs Kumar Jaspal Quah & Aishah ('the Firm'). It is not in dispute that all proceedings in

the said suit were conducted exclusively by the second respondent's, who is a consultant in the firm. The third, fourth and fifth respondents are partners of the firm.

[4] Dissatisfied, the applicants appealed to the Court of Appeal against the whole decision of the High Court. At the same time, they also applied for a stay of execution ('the High Court stay application') pending the disposal of the appeal. However, before the High Court stay application was heard, the parties agreed to record a consent order for an interim stay of execution, pending the disposal of the High Court stay application. The consent order was conditional upon the judgment sum and interests being paid to Messrs Zul Rafique & Partners as a stakeholder ('the Stakeholder') in a fixed deposit account.

[5] On 14 December 2010, a sum of RM34,989.978.47 was deposited with the stakeholder. The stakeholder then placed the said sum in a fixed deposit account on 16 December 2010 ('the FD sum').

[6] In the meantime, the first respondent's solicitor wrote to the applicants' solicitor, notifying them to release the FD sum immediately in the event the High Court stay application was dismissed. On 10 February 2011, the High Court dismissed the stay application.

THE COURT OF APPEAL

[7] On the same day, the applicants' appealed to the Court of Appeal against the High Court's order dismissing the application. Simultaneously, they also filed in the Court of Appeal, an ex parte application for a stay of execution of the High Court judgment. The Court of Appeal granted the ex parte stay. On 28 February 2011 the stay application was heard inter parte by the Court of Appeal and the court dismissed the same.

[8] Later in the afternoon of the same day, the stakeholder released the FD sum with accrued interests to the firm vide a cheque drawn on the stakeholder's bank account kept with RHB Bank Bhd. The amount released was RM35,087,135.06 ('the released sum').

THE FEDERAL COURT

[9] Dissatisfied with the Court of Appeal's dismissal of the inter parte stay application, the applicants filed an ex parte application in this court for an order, inter alia, to preserve the released sum in the hand of the firm. This court had on 2 March 2011 allowed the application and granted an ex parte preservation order over the released sum ('the ex parte preservation order'). This court then directed the ex parte preservation order be heard inter parte.

The inter parte hearing was fixed on 9 March 2011. In obtaining the ex parte preservation order, the applicants undertook to file a motion for leave to appeal to this court against the whole decision of the Court of Appeal in dismissing the inter parte stay application. A motion for leave to appeal was filed in this court, but was later discontinued.

[10] In the meantime, on 2 March 2011 the applicants' solicitor served the ex parte preservation order on the second respondent and the firm vide email at or about 3.49pm. The same was also served on the firm vide facsimile on 3 March 2011 at or about 5.13pm.

[11] In opposing the inter parte application for the preservation order, the first respondent had affirmed an affidavit dated 8 March 2011 ('the affidavit in opposition'). The affidavit in opposition was prepared by the second respondent. It was used in the inter parte hearing on 9 March 2011. In that affidavit, the first respondent deposed that the released sum had been disbursed before the ex parte preservation order was served on the respondents. The relevant paragraphs of the affidavit read as follows:

(a) The Released Sum was no longer in the possession of the 1st respondent and/or the firm. The Released Sum had been transferred out of the firm's client's account upon the 1st respondent's instruction and that the entire Released Sum had been disbursed on 1.3.2011 and 2.3.2011.

(b) The Released Sum had been disbursed by cash out of the firm's account vide 2 respective cash cheques for the sums of RM3,500,000.00 and RM31,500,007.00 respectively.

(c) Then, based on investment and tax advice, the 1st respondent had created a trust and appointed an international accounting firm namely Messrs PFK & Associates via PKF Tax Service Sdn. Bhd. to be the trustee. On the 1st respondent's instruction, the sum of RM 31,500,007.00 was disbursed by the firm to the trustee. The trustee then disbursed all the said monies on 1.3.2011 and 2.3.2011 in accordance with the 1st respondent's instruction.

[12] On 9 March 2011, this court dismissed the applicants' application for inter parte preservation order on the sole ground that subject matter of the preservation order was no longer in the hands of the respondents. To quote the words of this court, 'The horse has bolted'.

[13] Subsequent to that, the applicants alleged that they had received an anonymous note found in their solicitor's letter box. This anonymous note was said to have triggered the applicants to initiate this committal proceedings. Based on the anonymous note, the applicants believed that as at 5.13pm on 3 March 2011 (the date when the ex parte preservation order was served on the firm) the released sum was still in the possession of the firm and not disbursed

out as deposed by the first respondent in his affidavit in opposition. The applicants alleged that what transpired on the material date was that the cash withdrawals in the sum of RM3,500,000 and RM31,500,007 were used to purchase two bank drafts in the name of the firm from RHB Bank Bhd KLCC branch. The said sums were still with the firm when the ex parte preservation order was served on the firm.

[14] On that premise, the applicant alleged that the first respondent had told a lie in his affidavit in opposition and by so doing, the first respondent had interfered with the due administration of justice and/or in the course of justice.

[15] The applicants' solicitor had on 17 March 2001 wrote to the firm enquiring how the sums of RM3,500,000 and RM31,500,007 had been dealt with and in what manner they had been withdrawn. However, on the same day, the first respondent served a notice of change of solicitor on the applicants' solicitors. The first respondent's new solicitor is Messrs Mathews Hun Lachimanan.

[16] On 24 March 2011, the new solicitor responded to the applicants' enquiry but declined to furnish details on how the released sum was dealt with.

[17] In reply to the applicants' allegation that the ex parte preservation order was in fact served on the firm vide an email, the firm disclaimed knowledge of the said email as they said it was emailed to the firm's corporate department, and as regard the second respondent it was stated that he does not open his email every day. In short, they had no notice of the ex parte preservation order.

LEAVE FOR COMMITTAL APPLICATION IN THE FEDERAL COURT

[18] Against that background, the applicants applied for leave of this court for the order of committal against all the respondents. The first respondent was alleged to have committed contempt in making the false statement in his affidavit in opposition. The second respondent, who acted as counsel for the first respondent, was alleged to have committed contempt for aiding and abetting the first respondent. While the third, fourth and fifth respondents were alleged to be similarly liable as partners of the firm.

[19] The above allegations are contained in the supporting statement made pursuant to O 52 r 2(2) of the RHC, which reads:

> Grounds upon which committal is sought against the respondents are that the 1st Respondent has committed contempt of court by interfering with the due administration of justice and/or interfered in the course of justice when he swore in

an affidavit affirmed on 08.03.2011 filed in the proceedings known as Federal Court Malaysia Civil Application No. 08 Q-79-2011 that the monies sought to be injuncted by the applicants had been disbursed on 01.03.2011 and 02.03.2011, well knowing the same to be untrue and false and the 2nd, 3rd, 4th and 5th respondents have caused, aided or abetted the 1st Respondent in committing contempt of court in the circumstances hereinafter set out.

THE LAW OF CONTEMPT

[20] In dealing with the applications to set aside the leave for committal proceedings, it is necessary for us to consider the law of contempt. A good starting point would be the definition of contempt of court itself. *Oswald's Contempt of Court* (3rd Ed), at p 6 gives a general definition of contempt of court as follows:

To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, or their witnesses during the litigation.

[21] The jurisprudence for arming the court with the power to punish a contempt is best expounded by Brown J in *Re HE Kingdon v SC Goho* [1948] MLJ 17 as follows:

But the root principle on which this inherent power to punish for contempt is founded, and the purpose for which it must be exercised, is not to vindicate the dignity of the individual judge or other judicial officer of a court or even of the court itself, but to prevent an undue interference with the administration of justice in the public interest.

[22] Hence, the power to punish a contempt is not derived merely from statute nor truly from common law but instead flows from the very concept of a court of law (see *Borrie & Lowe's The Law of Contempt* (3rd Ed), at p 465; and *Master Jacob* (1970) 23 Current Legal Problems 23).

[23] Article 126 of the Federal Constitution empowers the Federal Court, the Court of Appeal and the High Courts to punish any contempt of itself. This is repeated in s 13 of the Courts of Judicature Act 1964. However since the RFC has no procedural provision on committal, therefore, by virtue of r 3 of the RFC, the procedure under O 52 of the RHC may be adopted. Thus, an applicant can bring contempt proceedings via O 52 of the RHC without having to go through the Criminal Procedure Code or the Penal Code even if the relief sought is imprisonment (see *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240; *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 and *Chung Onn v Wee Tian Peng* [1996] 5 MLJ 521).

[24] Contempt of court has traditionally been classified as being either criminal or civil. In England, the general approach has been that a criminal contempt is an act which so threatens the administration of justice that requires punishment whereas by contrast, a civil contempt involves disobedience of a court order. However, O 52 of the RHC is inapplicable for contempt in criminal proceedings where the contempt is in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court (see O 52 r 1(2)(a)(ii) of the RHC). One thing is clear, be it civil or criminal contempt, the standard of proof required in either type is the same, which is beyond reasonable doubt.

[25] Be that as it may, judges found the traditional classification as highly unsatisfactory. For instance, Salmon LJ in *Jennison v Baker* [1972] 1 All ER 997 observed it as 'unhelpful and almost meaningless classification'. Sir Donaldson MR stated the classification 'tends to mislead rather than assist' (see *AG v Newspaper Publishing Plc* [1987] 3 All ER 276 at p 294).

[26] Contempt has been reclassified either as (1) a specific conduct of contempt for breach of a particular court order; or (2) a more general conduct for interfering with the due administration or the course of justice. This classification is better explained in the words of Sir Donaldson MR in *Attorney-General v Newspaper Publishing Plc* at p 362:

> Of greater assistance is the reclassification as (a) conduct which involves a breach, or assisting in the breach, of a court order; and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or, more generally, as a continuing process, the first category being a special form of the latter, such inference being a characteristic common to all contempts per Lord Diplock in *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at p 449.

[27] This reclassification was adopted by the Court of Appeal in *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 MLJ 577(CA).

[28] Hence, the law of contempt is wide enough to cover not only those who are bound by the court order, but other parties who assist the disobedience to the court order. It was reported in *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54 that a person, who knowingly impeded or interfered with the administration of justice in an action between two other parties, was guilty of contempt of court notwithstanding that he was neither named in any order of the court nor had assisted a person against whom an order was made.

[29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has

provided procedural safeguards in committal proceeding which requires strict compliance. In this regard, Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112 had this to say:

> *Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations.* For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.
>
> *It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done.* For example, if the notice has not been personally served the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by *Taylor v Roe*, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal defect, even though the defendant gets to know everything before the motion comes on, and indeed answers the affidavits.
>
> When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question — cases where the documents do not comply strictly with the rules, but it is impossible that in any conceivable case the contemnor could be in any way prejudiced by the defects — then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would be in any other proceeding. (Emphasis added.)

[30] In similar tone, Lord Denning MR in *McIlraith v Grady* [1968] 1 QB 468 said at p 477:

> The second appeal is as to the committal order. *Here we must remember the fundamental principle that no man's liberty is to be taken away unless every requirement of the law has been strictly complied with.*

[31] Later, in *Re Bramblevale Ltd* [1970] 1 Ch 125, Lord Denning MR reaffirmed the same and had this to say:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt (see Lord Denning MR in at p 137).

[32] In *Chanel Ltd v FGM Cosmetics* [1981] FSR 471 Whitford J was reported to refuse an order of committal as he found the notice of motion for

committal before him to be bad because it failed on its face to specify the precise breaches of the undertaking of which the plaintiffs complained.

[33] The same spirit was echoed in *Chiltern District Council v Keane* [1985] 2 All ER 118, where Sir Donaldson MR at p 119 made this observation:

> However, where the liberty of the subject is involved, this court has time and again asserted that the procedural rules applicable must be strictly complied with.

THE SAFEGUARDS UNDER O 52 OF THE RHC

[34] The procedural law on committal in our law is laid down in O 52 of the RHC which is based on the then O 52 of the English Rules of Supreme Court 1965 (Revision 1965). It provides that no application for a committal order can be made without leave of the court. The application for such leave must be made in accordance with O 52 r 2 of the RHC.

[35] For ease reference, r 2 is reproduced below:

> 2
>
> (1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
>
> (2) An application for such leave must be made ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, and *must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.* (Emphasis added.)

[36] The safeguards in r 2(2) entail the application to be supported by a statement describing amongst others, the person sought to be committed and the grounds on which he is alleged to be in contempt. It must be supported by an affidavit verifying the facts relied on in the statement.

[37] We wish to state in clear term that the alleged act of contempt must be adequately described and particularised in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself.

The same approach was taken by the Supreme Court in *Arthur Lee Meng Kwang* case (see also *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112).

[38] Reverting to the present case, the first ground raised by the respondents is the applicants' non-compliance with O 52 r 2(2) of the RHC. Counsel for the respondents contended that the statement and the verifying affidavit in support of the application for leave under O 52 r 2(2) of the RHC, must be filed before the date of filing of the application for leave.

[39] In the present case, the applicants, had initially on 12 April 2011 filed the notice of motion ('Encl.2 (a)') together with the applicants' first affidavit ('Encl. 2(b)') and the statement pursuant to O 52 r 2 (2) of the RHC ('Encl. 2(d)'). On 26 April 2011 the applicants filed the second affidavit ('Encl 8(a)'). On 27 April 2011 the applicants filed the amended statement pursuant to O 52 r 2(2) of the RHC ('Encl. 9'). And on 3 May 2011, the applicants filed the third affidavit ('Encl. 12(a)'). Learned counsel for the respondents submitted that since encl 8(a) and encl 12(a) were filed after the date of filing of the notice of motion for leave, the applicants were in breach of O 52 r 2(2) which requires the affidavit to be filed prior to the filing of the motion.

[40] In support of his contention, he relied on the case of *Follin & Brothers Sdn Bhd v Wong Boon Sun & Ors and Another Appeal* [2009] 5 MLJ 362; [2010] 4 CLJ 64. In that case Zaleha Zahari JCA in delivering the judgment of court stated:

> We are in agreement with the High Court judge that the filing of an amended statement, the filing of further affidavits after the filing of the original notice of motion, statement and initial affidavit in support contravenes O 52 r 2(2) which requires an affidavit in support to be filed before the filing of the notice of motion. The High Court judge was right in ruling that such non compliance was not a mere irregularity but was fatal.

[41] In response, counsel for the applicants submitted that the Court of Appeal in *Follin & Brothers Sdn Bhd* failed to consider the principle of law laid down in the Supreme Court case of *Arthur Lee Meng Kwang*. There, Mohamed Azmi SCJ (as he then was) in his judgment stated:

> There is therefore a distinction in principle between cases where there have been non-observance of some safeguards laid down in O 52 of the RHC in the interest of the alleged contemnor, and a mere technical irregularity. Whilst the former is fatal, the latter is not. In our opinion, this is the correct principle to be applied in all contempt proceedings under O 52 of the RHC, which, it must be noted, is distinct from summary contempt procedure which is normally resorted to only in urgent and imperative cases, where the contempt is committed in the face of the court (see *Cheah Cheng Hoe v Public Prosecutor*).

Relying on *Arthur Lee Meng Kwang*, counsel for the applicants submitted that the respondents' procedural objection should be dismissed.

[42] In our view, what O 52 r 2(2) stipulates is that an affidavit verifying the facts must be filed before the application is made. We agree with counsel for the applicant that the word 'application' here cannot be read to mean 'filing' but rather the hearing of the application by the court. In this regard, we fully agree with the view expressed in *Arthur Lee Meng Kwang*. In that case, the objections were that:

(1) The motion does not state that it has been issued pursuant to leave granted on 4 July 1985;

(2) no statement was before the court on the date when leave was granted;

(3) the original documents in the ex-parte application including the affidavit in support were not served on the advocate;

(4) the leave has lapsed under O 52 r 3(2) of the RHC; and

(5) there was non-observance of r 71(3) of the RSC 1980.

[43] It was held that the alleged procedural defect No (1) and No (3) are technical irregularities, hence not fatal to the case. We also endorsed the view of Zulkefli Ahmad Makinudin J (as he then was) in the case of *Soceite Jas Hennessy & Co & Anor v Nguang Chan (M) Sdn Bhd* [2005] 4 MLJ 348.

[44] Similarly, in the present case, we are of the view that the irregularities complained of are mere technical irregularities which do not cause any prejudice or injustice to the respondents. We accordingly dismissed the procedural objection raised by the respondents.

[45] It was contended on behalf of the respondents that the statement filed by the applicants is vague, ambiguous, imprecise and lacking in material particulars. The statement in support of the application for leave as against the first respondent is found in para 3 referred to earlier.

FIRST TRANCHE: RM3.5M (CLEARED OUT ON 1 MARCH 2011)

[46] It cannot be denied that upon the stakeholder's cheque for the released sum being cleared into the firm's RHB account, they were monies belonging to the first respondent. The clearing into the RHB account took place on 1 March 2011 itself and this was disclosed in the first respondent's affidavit in opposition. That is not being disputed. What is disputed is whether the released sum was paid out of the RHB account prior to receiving notice of the ex parte preservation order on 3 March 2011.

[47] The affidavits filed on behalf of the respondents disclosed that monies were disbursed in three tranches. The question is whether any of these releases constitutes a breach of the ex-parte preservation order. The detail of the three tranches as they were referred to are as follows:

[48] On 1 March 2011, the third respondent presented a cheque signed by him for the sum of RM 3.5m and withdrew this sum in cash at 3:47:08pm. The monies were paid over to various third parties on 1 March 2011 itself on the instructions of the first respondent.

[49] As there was no injunction in place on 1 March 2011, the respondent contended the withdrawal of the first tranche in cash and the subsequent payment of the same to various third parties on 1 March 2011 cannot be in breach of the ex parte preservation order. Further, they said the documents produced by the applicants themselves vide encls 8(a) and 12(a) pursuant to their investigations reveal that the encashment of these monies out of the Firm's RHB account took place on 1 March 2011. On that premise, the respondents contended that the utilisation of the first tranche on 1 March 2011 did not violate the ex parte preservation order.

SECOND TRANCHE: RM31,500,007 ('THE TRUST MONIES') CLEARED OUT ON 1 MARCH 2011

[50] The second tranche involved the withdrawal of monies in cash and the subsequent remittance of the same to the firm's PBB account on 1 March 2011.

[51] The respondent contended that based on the documents produced by the applicants themselves pursuant to their investigations, in encls 8(a) and 12(a), the encashment and transfer out of these monies from the RHB account took place on 1 March 2011. Therefore, the utilisation of this second tranche on 1 March 2011 did not breach any order of the court. The averments in the first respondent's affidavit in opposition relating to the utilisation of the second

tranche are found at para 22 where it was averred that the second tranche was disbursed from his solicitor's account to his trustee on 1 March 2011.

[52] The respondents further contended that when the trust monies were paid to the trustee, they no longer belong to the first respondent. And the fact that the trustee chose to retain the firm as its solicitors does not render the second, third, fourth and fifth respondents guilty of any breach of the court's order.

THIRD TRANCHE: RM87,128.06 (CLEARED ON 2 MARCH 2011)

[53] The third respondent paid the sum of RM87,128.06 on the first respondent's instruction to a third party. The payment cleared out of the RHB account on 2 March 2011 itself and this is reflected in the firm's RHB account statement for March 2011.

[54] It is submitted on behalf of the respondents that there is no specific allegation of any breach in relation to the third tranche and neither is there any allegation of the disclosure of this transaction at para 23 of the first respondent's affidavit in opposition being untrue.

FINDINGS

[55] Thus, from the evidence before us, it is clear that the entire released sums were paid out and cleared from the RHB account at the latest by 2 March 2011, that is one day prior to the service of the notice of ex parte preservation order on the respondents. Therefore, the question of breach of the said order does not arise. Similarly the averments in the first respondent's affidavit in opposition regarding the released sum cannot be said to be untrue or a lie as alleged by the applicants. On that premise, we hold that para 3 of the statement filed in pursuant of O 52 r 2(2) of the RHC is unsustainable.

[56] The complaint against the second, third, fourth and fifth respondents is for aiding and abetting the first respondent. Since, we find that the complaint against the first respondent is unsustainable hence, the complaint against the second, third, fourth and fifth are equally unsustainable.

CONCLUSION

[57] For the above reasons, we allowed the respondents' applications to set

A aside the leave order issued against them and hence, the motion for committal against the respondents is accordingly struck out with costs.

Motion for committal against respondents struck out with costs.

B

Reported by Kohila Nesan

C

D

E

F

G

H

I